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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO et al., appellants,
v.
CHARLES F. CLYNE, UNITED STATES DISTRICT attorney et al., appellees.
} No. 701.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

APPENDIX TO BRIEF FOR APPELLEES.

Believing that the judgment of Congress with respect to the prejudicial effect trading in futures on the Grain Exchanges has upon the free current of interstate and foreign commerce will be sufficient for this court to sustain a statute designed to end such abuses, we have contented ourselves in our main brief with the argument that this case is ruled by the recent decision of this Court in *Stafford* v. *Wallace*, 258 U. S. 495.

As, however, our learned opponent has seen fit to submit to this Court as an appendix the testimony upon this question of fact of numerous theorists who are connected with some of the colleges and universities of the country, we now submit as

an appendix to our brief a very careful and convincing statement prepared by the Department of Agriculture to show the prejudicial effect of unrestricted future trading upon interstate commerce and the reasonableness of the regulatory requirements of the act now under consideration. To avoid duplication, however, we have omitted from this Appendix that portion of the Department's memorandum which deals with the admission of cooperative associations to membership in the Chicago Board of Trade, that subject having been fully discussed in our main brief.

We think that the evidence herein submitted of the department of the Government which has the practical supervision of the agricultural interests of the country will have great weight with this Court—certainly more weight than can be attached to the abstract theories of college professors, even when fortified by a classical excerpt from an oration of one Lysias, who, some tweny-three centuries ago, expressed some opinions from the Bema with respect to grain dealers. Had we time we would be tempted to ascertain from Egyptologists whether King Tutankh-Amen may not have had some views on the subject of future trading when he was buried in the Tomb of the Kings thirty-five centuries ago, but as these "brisk and giddy-paced times"—to use Shakespeare's phrase—do not permit of such antiquarian researches, we think this Court will be amply justified in accepting the deliberate judgment not only of the

Department of Agriculture, with its intimate knowledge of the commerce in grain, but also of the Congress of the United States which, after many investigations and prolonged discussions in both houses of Congress, has twice reached the deliberate conclusion that the grain exchanges—notably the Chicago Board of Trade—in operating to the extent of 75 per cent on a purely speculative basis, are a positive burden on the current of commerce in grain which should flow unvexed to the great markets of the world.

SCOPE OF THE GRAIN FUTURES ACT.

Section 5 of the Act contains the conditions imposed by the Act upon an exchange for designation. The first may be disregarded here because it is merely a classification and is inclusive of all the leading grain futures exchanges of the United States. The others are (b) the keeping of memoranda of all transactions in grain, whether cash or futures, as directed by the Secretary of Agriculture; (c) the prevention of the dissemination by the exchange or any of its members of false, misleading, or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodities; (d) the prevention of manipulation of prices or the cornering of grain by the dealers or operators upon the exchange; (e) discontinuance of the practice of discriminating against cooperative associations of producers; (f) the execution of orders and decisions of the special tribunal created by Section 6 of the Act.

It is submitted that these requirements are reasonable and closely related to exchange activities, and obviously designed to protect interstate commerce. Exchange members should, as a matter of business, and do now make memoranda of their transactions such as are required by the Act. They admitted in the hearings on this legislation and other bills pending in Congress that false reports, manipulation, and corners are abuses which should be eliminated, and that the exchanges have made rules for the purpose of preventing them. But these abuses go on, nevertheless. Mr. Julius H. Barnes, who is one of the country's biggest exporters of grain and during the war was first assistant to Hon. Herbert Hoover as food administrator and afterwards was head of the United States Grain Corporation, in a letter of June 2, 1921, to Mr. D. F. Piazzek, a partner in one of Mr. Barnes' several grain organizations, said:

> I note what you write about the Chicago Board of Trade, and nothing has embarrassed me like the gyrations in Chicago, and the last day, the very day we were arguing before the Senate Committee, that the Governors of these Exchanges were making some progress themselves in eliminating manipulations. I had the pleasure of telling that to Mr. Field in New York to-day, who was the man who finally held the May in Chicago, and attempted to justify to me here. (Page 85 of the testimony taken by the Federal Trade Commission in New York on October 6, 1922.)

This Act is merely intended as an aid to the exchanges in their unsuccessful effort to remove these abuses. The exchanges say that they have no prejudice against cooperative associations as such and that they object to them as members only on the ground that their method of handling grain involves a violation of the existing exchange rule against rebates as construed by them. The Act merely prevents the exchange from discriminating against cooperative associations with respect to membership and provides:

> That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such associations.

Clearly the return of such money is not rebating. It is discussed later in the brief.

THE GRAIN FUTURES ACT IS CONSTRUCTIVE.

The Grain Futures Act is the culmination of more than thirty years of consideration and investigation by Congress and Federal agencies of the business of trading in grain and other commodities for future delivery and the effect thereof upon interstate and foreign commerce. Numerous hearings were held on the different bills introduced in Congress during that period. Officers, directors, and other representatives of the Chicago and other grain exchanges attended these hearings and introduced both oral and documentary evidence. That the Chicago Board of Trade

was given full opportunity to present its views on the pending legislation is shown by its report for the year ended December 31, 1921, from which the following statement is taken from the report dated January 10, 1922, of its President, Joseph P. Griffin:

> It is to the everlasting credit of Congress and State legislatures that they granted a full and free opportunity to explain the merits of the grain-marketing system. After eight months of pitiless publicity, of most searching investigation, these bodies—none too friendly—were unable to locate any vital defects in that system. As a consequence, the only laws that have been enacted are purely regulatory, and by affirmative action not only recognize, but, in fact, perpetuate practically every method of doing business on grain Exchanges. (Pages XIX to XXI.)

In the hearings on The Future Trading Act, exchange representatives referred to it as constructive legislation.

Mr. Griffin testified:

> In principle I heartily indorse the Tincher bill. I do so because, unlike other measures, I deem it to be constructive. It is constructive, and unlike other measures because it does not seek to tear down and destroy the existing machinery for farm products without providing any substitute. It is further constructive because it proposes to abolish practices or abuses which, while perhaps not immoral or illegal, have no particular trade or economic value and may be deemed as wasteful. I fur-

ther indorse the bill because, as I understand, it recognizes the necessity for hedging; second, the bill recognizes that there can be no hedging without future trading; and, third, the bill recognizes that there can be no future trading without speculation—there can be neither hedging nor speculation without future trading. The bill does not defend the present system of marketing grain, but rather, as I understand it and view it, it provides that the existing machinery should be used until a better and improved substitute can be developed.

Now, the Tincher bill accomplishes, in my understanding, all of the objectives I have set forth, and consequently, except in a purely practical sense, I have no opposition to this measure. (Future Trading Hearings before the Committee on Agriculture, House of Representatives, 67th Congress, 1st Session, Series C, page 159.)

Mr. Wells, of the Minneapolis Chamber of Commerce, testified:

H. R. 2363, the so-called Tincher bill, embodies a great many constructive ideas, and with certain modifications to make it practical in its operation and to preserve the hedging markets, would, in my judgment, prove constructive legislation.

* * * * *

* * * but it strikes me that in the framing of the legislation now before you—and I will refer specifically to Mr. Tincher's bill as being the most constructive—you have

overlooked the requirements for a hedging market. (Id., pages 67–68.)

I am speaking now as a user of the facilities, and I am not saying they are ideal. I am not saying they could not be remedied. I am saying that a great deal that you propose in your bill is very much to the point and very constructive, but I do say that unless a class of traders other than those engaged in the grain and milling business are allowed to trade, you will narrow the markets to such an extent that they will lose their value as hedging markets.

* * * * *

I have no quarrel to make with such provisions of this bill as tend to place the grain exchanges under the supervision of a departmental head, provided that the arbitrary power to close those exchanges is not left with the head of the department. (Id., pages 85, 91.)

CONDITIONS PROMPTING LEGISLATION.

Future trading is carried on by the public and the grain trade for speculative purposes. Grain merchants, millers, and exporters also use future trading for the insurance which it affords them through "hedging" their transactions in actual grain. The speculator buys or sells according to whether he thinks the price will go up or down. He helps to make the market for the man who handles actual grain and resorts to the futures market for insurance purposes.

Country elevator men in Nebraska, Iowa, the Dakotas, and other grain-producing States, realizing that price fluctuations may occur before they can deliver in Chicago or some other terminal market the grain which they have purchased from farmers, sell futures on the Chicago Board of Trade or some other futures market for protection. Millers in Ohio and other States buy futures for protection while they are picking up the cash grain needed to fill contracts for future delivery of flour. The Liverpool grain merchant buys futures for protection while assembling his cargo of grain at Baltimore or some other port for shipment to Liverpool. The theory of these counter transactions is that cash and futures prices move along parallel lines and that, as the price of futures goes up or down, the resulting gain or loss offsets a corresponding loss or gain in the cash grain due to the corresponding fluctuations in the price of cash grain.

As a matter of common knowledge, the court knows that this country exports large quantities of grain and that the surplus from the great grain-producing States moves through Chicago and other gateways of commerce en route from the farms on which it is produced to the ultimate consumers in other States and in foreign countries. *Lemke* v. *The Farmers Grain Company of Embden, North Dakota*, 258 U. S. 50. It is obvious, therefore, that the bulk of the actual grain involved in the cash transactions with which these futures deals are thus interwoven

moves in interstate and foreign commerce. *The Chicago Board of Trade* v. *United States*, 246 U. S. 331. On account of the extent to which futures trading is used in connection with these transactions in interstate and foreign commerce, it is apparent that any manipulation or cornering of the futures market necessarily obstructs and burdens interstate and foreign commerce.

For many years it has been charged openly and repeatedly, not only by the public but by the grain trade, including many members of the grain exchanges, that the futures grain market has been manipulated and cornered to the detriment of both producer and consumer. In view of this widespread feeling of distrust and suspicion, bills have been introduced in Congress for the correction of these abuses, and numerous hearings have been held in connection with them. A resolution (House Res. 424) introduced in the 63d Congress, 2d Session, and referred to the Rules Committee, evidences the state of unrest and suspicion by the farmer and the public with respect to transaction on the futures market. The resolution says:

> That it is the common practice of these controlling members by concerted action in these three great markets, offering or withdrawing enormous quantities of wheat of the public warehouses and terminal elevators and by concerted bidding and betting in the pit on futures, to depress or raise the price of wheat to suit the purpose of their gambling

operations; that the prices are by such combination and manipulation depressed while the farmers are compelled to market the heavy portion of each crop, and raised and manipulated so as to tempt speculative investors after the bulk of each crop is in the control of the combination; that for each bushel of real wheat actually sold and handled in each of these terminal markets at least 100 bushels are bought and sold in so-called future trading; that the multiplied expense of all such future trading, as well as most of the profits thereof, must come out of the real wheat actually marketed; that the only part of the gains of gambling in wheat not borne by the farmer or buyer of bread is borne by men tempted to speculate in the pit; that the number of embezzlements, bankruptcies, and wrecks caused by gambling in wheat futures is appalling; that the members of the Chicago Board of Trade, the Minneapolis Chamber of Commerce, and the Duluth Board of Trade, through whom such gambling operations are made, cover and hide the record of the losses sustained by speculators and refuse to exhibit their books to the State officials, whose duty it is to protect the public; that the Chamber of Commerce of Minneapolis and the Board of Trade of Chicago, by virtue of a large membership of wealthy men closely allied with banking institutions, transportation companies, and with certain daily newspapers of their communities, exercise and control an unwholesome influence in local government and public opinion. (Future Trading Hearings before

the Committee on Agriculture, House of Representatives, 66th Congress, 3d Session, pages 768–769.)

The state of the public mind and of the thought of some of the grain trade, including members and friends of the grain exchanges, is reflected in a letter of February 28, 1921, from the President of the Board of Trade of the City of Chicago to the Board of Directors of that institution. The letter follows:

CHICAGO, *February 28, 1921.*

BOARD OF DIRECTORS,
Board of Trade of the City of Chicago,
Chicago, Ill.

GENTLEMEN: It is a matter of common knowledge that the grain exchanges have recently been subject to much criticism. It is openly charged that many trade practices work to the detriment of both producer and consumer. These complaints are not confined to farmers, but rather include many elements in the grain trade (including members of this and other exchanges), millers, Members of Congress, and public officials.

Many writers heretofore friendly to exchanges have recently been very bitter in their denunciation, charging that the practices of which they complain can all be remedied from within, but allege that the exchanges are doing absolutely nothing in this connection. The officials of the leading exchanges of this country have denied the charges mentioned. That has been the attitude of this board. The denial of these allegations is undoubtedly

based upon the conscientious belief that the charges lack foundation.

However, it may be possible that the responsible officials of the several exchanges are too close to the subject and are prejudiced. It seems to me but fair and just and in exact line with our duty to examine the charges to determine their truth or falsity. Further, if there be of evil in our business it is our duty to meet the situation boldly and apply the cure ourselves rather than wait for legislative action, which may be hasty, ill-tempered, and unwise.

To that end I am herewith enumerating the practices which are claimed to be inimical to the welfare of producer or consumer, or both. I have embraced herein all the so-called evils which have been disclosed to me from any source, including the recent hearing before the House Agricultural Committee at Washington. I respectfully suggest that the board of directors give their serious consideration to the several subjects mentioned, so that within the next 30 days we may formulate a plan of action based upon an honest and conscientious examination of these complaints.

May I say for your information, I have also submitted practically a similar communication to the advisory committee.

This latter committee is made up of some of the best minds of our exchange, and I have asked them to give their best independent thought on these questions.

The evils or practices to which I refer are as follows:

Overspeculation.

Market manipulation.

Indemnity transactions.

Private-wire offices in smaller cities and villages in the agricultural district tributary to the terminal markets.

Trading in future delivery in the distant futures.

Failure to properly censor market news, crop reports, etc.

Short selling.

Suggestions as to a proper method of coping with this situation are numerous and come from many sources. Some are of the opinion that we should entirely abandon indemnity transactions and should forbid the operation of so-called country wire offices. Members of Congress, as well as representatives of farmers and trade organizations, have suggested that we limit the quantity of speculative transactions for each individual, and the same authorities also urge that we confine trading in future delivery to a short period of time—suggestions varying from 30 to 90 days. As to manipulation, if such practices exist, I think there will be no dissent to my statement that such practices should not only be disapproved but steps should be taken to render the operation of the manipulator impossible on this or any other exchange.

The subjects embraced in this communication are numerous and I recognize will require careful thought and deliberation. I

believe I have condensed in this letter all of the alleged evils of the exchanges. Let us approach the subject with an open mind. If our conscience tells us that any or all of these practices mentioned exist, and constitute an injustice to either the producer or consumer, or if we decide such methods are immoral or lacking trade or economic value, then I urge we meet the situation honestly and boldly, and apply the necessary cure.

Respectfully submitted.

J. P. GRIFFIN, *President.*

Mr. Randall, of Gill & Fisher, one of the largest exporters in the country, in a letter set out at page 1007 of Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, Third Session, in January and February, 1921, says:

> The welfare of boards of trade, as well as the welfare of the merchants composing their membership, rests upon credit and reason. When a large part of our people discredits us for certain practices allowed under rules, and a state of unreason is produced which entails great loss on the public, then it is time for the boards of trade to take heed unto their ways and correct them by their own action before an unthinking and injured public opinion pulls down a building carefully erected during many years, but into which certain nuisances have gained admittance and been harbored unrecognized.

The present attorney of the Board of Trade of the City of Chicago (Mr. Henry S. Robbins), when testifying in that capacity before the Rules Committee in the hearings held in connection with House Res. 424, above referred to, said:

> There are some thoughtless people who do not take a broad view of anything and who see nothing but evil in these exchanges. No thoughtful person, however, considers the commercial exchange as either entirely free from evil or wholly devoid of good. Those who oppose exchanges concede that they aid legitimate commerce but contend that their gambling preponderates. Intelligent friends of the exchange will concede that there is often gambling there, but claim that the aid they render to commerce outweighs the evil of this speculation. (Page 206, Hearings on Grain Exchanges, U. S. Congress, 1914.)

THE FINDING BY CONGRESS.

Upon the evidence adduced at the various hearings held during the past thirty years or more as a result of the numerous criticisms and complaints as to the conduct of the grain exchanges, Congress made a finding in Section 3 of The Grain Futures Act to the effect that grain futures sales as at present conducted on the exchanges are affected with a national public interest and that the sudden and unreasonable price fluctuations which occur as a result of speculation, manipulation, and control of such transactions are an obstruction to, and a burden upon, interstate commerce.

As a result of the hearings held on the Washburn "Anti-Option Bill," which was pending before it in 1892, the Senate Committee on the Judiciary made a report (Sen. Rep. No. 893, 62nd Congress, 2nd Session) to the effect that transactions in grain futures constitute a "great evil and injury which ought to be remedied." The minority stated that—

> They also believe that the evil growing out of such dealings is great and demand(s) the prompt and efficient action of Congress. * * * They believe that Congress has full power, under the power to regulate commerce among the States or with foreign nations, to suppress the evil by direct action, and that such power ought to be exerted by the passage of a proper bill.

Senator Mitchell, of the Committee, submitted a separate statement of his views on the bill, in which he said:

> I am of the further opinion that the commerce power, as defined in Section 8 of the Constitution * * * may, by proper legislation, be invoked in aid of the practical suppression under severe penalties of the business of dealing in options and futures, as defined in the first and second sections of the House bill, on the ground that such business, as is apparent from all the testimony taken before the Judicial Committee, is an obstruction to interstate commerce or commerce among the several States * * *. The effect of such legislation, it is hoped and believed, will have a tendency to minimize

> the evil effects of speculative gambling in agricultural products, a system that creates a most deleterious and destructive competition with the sale of actual farm products, which tends to reduce the price of every bushel of grain, every pound of pork, and every bale of cotton, and affects adversely the material interests of the many million people who cultivate farms in this country. (Congressional Record, Vol. 23, Part 6, page 5832.)

The recent resolution (S. Res. 133, 67th Congress, 2nd Session) directing the Federal Trade Commission to make an exhaustive investigation of conditions affecting the grain trade is indicative of the present state of the Congressional mind. It recites:

> Whereas the condition of the export market has been alleged as one of the reasons for the decline in the domestic prices of grain since the summer of 1920; and
>
> Whereas there nevertheless has been during the past year a record volume of exports of grain from the United States and at prices showing a wide margin over the price at the farm; and
>
> Whereas a wide spread of 15 to 20 cents between cash wheat and futures throughout the marketing season of 1920–1921 existed and was caused either by the unprecedented export demand or heavy pressure on futures, or both; and
>
> Whereas the organization of the export trade and all the conditions connected with the export of grain by American exporters

and the purchase thereof by foreign buyers are of vital interest to American farmers and consumers:

EVIDENCE SUPPORTING THE FINDING.

EXCHANGES ARE AFFECTED WITH A NATIONAL PUBLIC INTEREST.

The declaration that sales of contracts for the future delivery of grain as conducted on the boards of trade are affected with a national public interest is abundantly supported by the evidence adduced at the hearings which were held by the committees of Congress having charge of the several bills for the regulation of the exchanges. Pertinent extracts from the testimony of some of the witnesses are set out below.

Mr. Julius H. Barnes said:

> In view of the general recognition, in Congress and out, of the national service rendered by grain exchanges through their hedging facilities, a discussion of the economic benefits of exchange trading may be narrowed to a consideration of the defects or abuses in the national marketing structure, and the feasibility of remedying those defects or eliminating those abuses, without destroying the basic function of such exchange trading. The criticism directed at these exchanges, and the explanatory defenses aroused thereby in recent years, have apparently led to a very general understanding and acceptance of their great national service in the form of narrow trade margin between producer and consumer, due solely

> to the liquid hedging facilities of those exchanges. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 839.)

Mr. Barnes, in a letter of May 13, 1922, addressed the president and directors of the Chicago Board of Trade, which is set out in full on page 69 of the Grain Futures Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 67th Congress, 2nd Session, on H. R. 11843, said in part:

> The prime national service of Chicago future trading rests in the merchant's and miller's security, by insurance against losses by changes in price levels, and that that insurance feature preserves narrow trade tolls between farm and consumer, because facilitating large credits and ready consumption. That service when fully utilized covers nation-wide mill and merchant stocks in channels not naturally tributary to Chicago, yet moving on the security of Chicago hedges.

Mr. Gates, a member and formerly president of the Chicago Board of Trade, testified:

> This is a national problem rather than a local problem. The fact that it is a market that is used by the people all over the country is the thing that gives it its national interest. We have no question about your right to legislate on this matter. * * * We are willing that there should be a supervision of our business in the national interest. (Future Trading in Grain Hearings Before the

Committee on Agriculture and Forestry, U. S. Senate, 67th Congress, 1st Session, on H. R. 5676, page 331.)

Mr. Joseph P. Griffin, while president of the Chicago Board of Trade, testified:

> Vast quantities of grain which never come to the Chicago market are nevertheless hedged in the Chicago market. In fact, the Chicago market is practically the clearing house of the world for the purpose of price insurance. Dealers in Europe, Argentina, and Australia use the Chicago market for hedging operations. Grain dealers in Omaha, Kansas City, St. Louis, New York, Baltimore, Boston, Winnipeg, Montreal, and hundreds of other cities use the Chicago market for hedging purposes. The grain handled by these dealers may never come to Chicago, nevertheless these hedging operations protect these grain owners against price fluctuations while the grain is being handled in their home markets. Furthermore, dealers in Chicago annually handle many millions of bushels of grain which never come to Chicago, but which are purchased in one market and consigned to another. These dealers invariably use the Chicago market for price protection.
>
> Exporters purchasing grain at various country points and consigning it to the seaboard for export almost invariably hedge their holdings on the Chicago market, although the grain may never come to Chicago. Furthermore, with the change of market conditions speculators may desire to decrease the amount of

their holdings, thus passing on to other speculators a part of the risk originally assumed. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, pages 671, 672.)

MANIPULATION.

There is a vast amount of evidence, including the testimony of men of high standing and of practical experience in the grain business and also of members of the grain exchanges, that there is manipulation of the markets. It will be noticed that some of them qualify their testimony by saying that short selling can not *permanently* depress prices. Congress has not said, and we do not contend, that it can do so *permanently*. The statement that it does not do so permanently by necessary implication admits that it does so temporarily. These temporary depressions are injurious because they affect in a general way the price of cash grain throughout the country, and particularly so to the farmer whose cash grain may be caught on the market. Such manipulated depressions are also injurious to the speculator holding contracts on small margins on the long side of the market. The existence of the exchange rules against manipulation is an admission that the future trading machinery is susceptible to manipulation and for that reason should be adequately protected against manipulation. The existence of such rules certainly does not deprive Congress of its right to legislate on the subject, but suggests to Congress the necessity

for such legislation, as the exchanges may abolish their rules at any time.

Hon. Herbert Hoover says:

> On the other hand, I have the feeling that very large volumes of short selling that are deliberately intended to depress the price result in considerable injury and loss to holders, particularly farmers, who are not in a position to hold as against a lowering price, as in the case of men who have outstanding obligations. They are forced into liquidation, and grain is brought into the market that would not normally flow there, and thereby such a manipulation has a damaging effect on price and works great injustice. (Future Trading Hearings before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 896.)
>
> The second form of manipulation and the one that I feel does at times take place, is the making of a drive on the price by either the sale or the purchase of such quantities as will affect the price by the volume of material coming to the market at that particular time. I would regard those transactions as an attempt to dislocate the normal flow of the law of supply and demand, and any attempt of any individual to dislocate a free market must be against public interest. I feel it is also against the interest of the individual producer, because a drive on the market that depresses the price must find a considerable number of farmers who, through the fall in price and their outstanding obligations, are

compelled to liquidate, and they have been done an injury. Incidentally, the commodity has been brought into the market, and an acceleration to depression has been created.

* * * * *

I would give it (a commission) some power of regulation over manipulation.

* * * * *

My impression is that there have been drives against prices. My mind approaches it from rather a different angle; that is, the fall of prices was probably made more precipitate by these drives against the prices. In the long run, the price will make itself on demand and supply, but manipulation of the type we are discussing serves to accelerate what will be inevitable, and the acceleration often works to the disadvantage of the producer. (Id., pages 911–913.)

(See also pages 895, 900, and 919.)

Julius H. Barnes says:

It is recognized also by every student of marketing that it is possible to use these same trading facilities for short selling, that by its own volume and weight becomes manipulative in character. The check on such influence lies in the fact that such sales must be bought back to a corresponding amount. Even such weighty selling, not met by equally weighty buying, can produce permanent declines only by the foresight that recognizes in advance the coming development of natural influences. Otherwise the very attraction of a clearly forced price would attract an absorptive buying that would nullify such efforts at depression.

But it is also true that even though such a price depression must be temporary in character it may, during its period of effectiveness, do substantial injustice by forcing the liquidation of grain held on margins, or by the price tendency thus displayed frightening owners otherwise confident of the ultimate value of their goods. The ethics of business morality frown upon such purely manipulative attempts. Traders possessed of resources extensive enough to make such manipulative selling effective, increasingly recognize the social injustice of deliberately creating a price level by sheer pressure of offerings. I am convinced that the greater part of the grain trade condemn such attempts, infrequent as they are. I am convinced they are steadfastly trying to devise methods of reducing or eliminating this character of trading without destroying the market fabric itself.

Exchange authorities have, step by step, in the past developed both the business conscience that condemns corners in grain and developed the methods to make them ineffective until they are almost now a matter of history.

It may not be too much to hope that a more enlightened business conscience, plus methods and practices developed by actual experience, may succeed in time in the reduction also of this admitted evil. Until that day care should be taken that the great daily and hourly service producing the low trade tolls be not wrecked or damaged and it is equally important that regulations be not

imposed which tend to put a premium upon the unscrupulous in business. (Id., pages 841–842.)

Frankly, I have not been able to see any way to protect against manipulative speculation, which may well be classed as objectionable in every way. To eliminate that without destroying the liquidity or readiness to trade and cover contracts, which is the very essence of these narrow trade tolls, it is not enough to protect the trades against radical changes in price—that is a great security—but there is a further service performed by this trading, which is the ability to cover a contract in two minutes, which could not be done if you limit the trading to hedging against actual grain.

* * * * *

I do speak of the exaggeration which I hope to see the trade themselves work out in time. At least we have made this much progress, that it is frowned upon as being unethical to use large resources to purchase wheat and influence the price level, even temporarily. It is not good ethics any more than spitting on the carpet is good ethics these days. (Id., pages 856–857.)

(See also pages 863 and 865, and pages 75, 80, 84, and 88 of Future Trading in Grain Hearings Before the Committee on Agriculture and Forestry, U. S. Senate, on H. R. 5676.)

Clifford Thorne, General Counsel for the American Farm Bureau Federation, an organization of some million and a quarter farmers, and General Counsel

for the Farmers National Grain Dealers Association, representing something like 300,000 farmers who own and operate their own cooperative elevators in midwestern States, testified:

> In reply to that, I want to say that any artificial manipulation of the market interferes with this wonderful instrumentality which has been described as hedging. Further, I want to say that the people who generally profit on corners are not the growers of the grain. Anybody experienced in the grain trade will know that, and, further, I want to say that if a corner results in very excessive prices the reaction is almost inevitable for it to be in the other direction, and as a general rule you will find the producer will be able to market the bulk of his commodity when it is in the other direction; and, further, I want to add that the producer is not anxious to get excessive corner prices. He wants a fair, stable market, and that is what he is seeking. (Id., page 974.) (See also page 973.)

Mr. Frederick B. Wells, Vice President of F. H. Peavey & Co., a corporation owning or controlling a number of subsidiaries which operate country and terminal elevators, said:

> While I believe that speculation is absolutely necessary for the existence of a satisfactory hedging market, I am strongly opposed to manipulative speculation and would gladly see it eliminated from the markets if it were possible without destroying the entire machinery. (Id., page 957.)

Mr. Randall, in his letter hereinbefore mentioned, said:

> * * * There was no reason except the "smashing process" to break the December option in Chicago in two weeks from $2.75 to $2.06.
>
> Because all the while, every day, more wheat was being sold to Europe than was being brought from the country. The export sales were limited only by prudence on the part of exporters.
>
> I believe (in) trading in futures is an essential part of the grain business from the producer's side, the miller's side, and the exporter's side. It would be a bad day for the grain trade if trading in "futures" should be abolished, but there is a vast gulf between the legitimate trade and the gambling element. This chasm should be bridged by the boards of trade themselves before both sides lose their footing.

Joseph P. Griffin said:

> In this connection it may be pointed out that while prices may undoubtedly be advanced by manipulation, particularly where manipulation goes so far as to establish a corner, it is impossible to permanently manipulate prices downward. The reasons for this will be pointed out in connection with the subsequent discussion of short sales. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 670.)

The Federal Trade Commission, in its report on The Grain Trade, says that up until 1900 the history of future trading on the Chicago Board of Trade is a history of corners, but that since that date corners have been comparatively few:

> For the period prior to 1900, the history of future trading in Chicago seems to have been largely a history of corners, and the market seems to have afforded more opportunity for this and other forms of manipulation than for the development of an economic organization adapted to the needs of the public. However, this impression may be due to a tendency to record what is sensational rather than what is serviceable. Since 1900 there have been comparatively few important corners. (Page 29, Vol. 5, of the Report on The Grain Trade.)

In its letter of December 13, 1920, transmitting to the President its report on wheat prices for the 1920 crop, the Commission says (page 8):

> (13) Prices of wheat futures, the decline in which has been especially the subject of criticism, are susceptible of manipulation. Wide fluctuations in prices and large discounts of the future price below the cash price have prevailed. This has made it unsatisfactory for "hedging," and hedging sales may also appear to be manipulative, because, if they are large, they may cause sharp depressions. Wheat futures are not functioning well, even according to the standards of their advocates.

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At page 43 of that report, the Commission, speaking of the causes for the October, 1920, slump in wheat, says:

> There was the usual feature of speculative momentum and rebound. There was doubtless much short selling.

At page 60 it says:

> While fluctuations in wheat future prices, and, of course, in cash prices to some extent by way of reflection from the futures, may be explained primarily as due to the narrowness of the market, irrespective of the constituent elements of the trade, it is reasonable to suppose, and there is a good deal of grain trade opinion to the effect, that some of the extremes touched have been due to the speculative element. The shorts have at times carried the market too far and then have become frightened and run to cover. It is probable that the low price reached early in August was due to the speculators, at least in the sense that they carried the movement too far though export conditions or reports of conditions as regards export buying at that time pointed to a decline in prices. The low level touched in October was more probably chiefly due to the large Canadian crop and the movement for importation of wheat from Canada. Even those men in the grain trade who are friendly to speculation admit that the fluctuations of the market are greater because of the tendency to push things too far, which is followed by too rapid reaction.

The Commission refers frequently in the first-mentioned report to Taylor's History of the Chicago Board of Trade. That author gives on pages 991 to 1260 of Volume II an interesting account of the details of many corners during the years 1900 to 1917, when the last edition of his book was published. The details of the corn corner in 1901 are found beginning at the bottom of page 1027; the corn corner in 1902 on page 1042; the oats corner in the same year on pages 1042 and 1043; the wheat corner of the same year on page 1043; the 1903 oats corner at the bottom of page 1064; the 1903 wheat deal at the bottom of page 1065 and top of page 1066; the 1905 corn corner at the bottom of page 1083; the 1905 wheat corner on pages 1091 and 1092; the 1906 wheat corner on pages 1108 and 1109; the 1907 wheat corner on pages 1118 and 1119; the 1907 wheat deal on pages 1125 and 1127; the 1908 wheat, oats, and corn deals on pages 1133 to 1141, inclusive; the 1909 wheat corner on pages 1146 to 1149; the 1911 wheat deal on pages 1163 to 1165, and 1173; the 1912 wheat speculation on page 1182; and the 1913 corn speculation on page 1190. We do not call attention to the war period because conditions were then abnormal.

The President, by letter of October 12, 1920, a copy of which will be found on page 11 of the Report of the Federal Trade Commission on Wheat Prices for the 1920 Crop, published December 30, 1920, ordered an investigation of market conditions because

of the widespread feeling of suspicion and distrust due to the sudden and unreasonable fluctuations which occurred that year in the price of December wheat on the Chicago futures market. The price had become so erratic as to discourage agriculture and demoralize legitimate business. Official quotations show that wheat broke 30 cents on the first three days of the month of October, advanced 20 cents the following week, dropped 15 cents in the next two days, advanced 31 cents in the next three days ending October 15, dropped 31 cents between the 15th and the 22nd, and advanced 21 cents by the end of October. It is absurd to say that such fluctuations are due to the normal operation of the law of supply and demand and that they are beneficial to the producer and the consumer.

In 1921 May wheat on the Chicago futures market was driven down 42 cents in March and the early part of April. Following this, it had advanced 65½ cents by May 24, then in two days dropped 20 cents, and in the next two days advanced 22½ cents to $1.87½ on May 31. Violent fluctuations of this sort can not be based upon the law of supply and demand and are patently detrimental to both producer and consumer.

In May, 1921, July wheat advanced 26 cents from the 14th to the 25th, then declined 7 cents. From June 1 to 3 it advanced 13 cents and dropped 13 cents in the next four days. From June 7 to 10 it advanced 12 cents, dropped 10 cents in the next three

days, and by the 13th had advanced 14 cents. From June 13 to 24 it dropped 19 cents, advanced 10 cents in the next three days, dropped 16 cents in the next two days, then advanced 6 cents, and on June 30 the price was $1.25, while on May 31 it was $1.28½, a net difference for the month of less than 4 cents. These sudden marked differences were manifestly not due to the law of supply and demand, and obviously were detrimental to both producer and consumer.

On May 31, 1921, cash wheat (grades 1 and 2) sold within two cents of the May future. On the next day cash wheat (grade 1) dropped 36 to 38 cents, grade 2, 32 to 35 cents; and grade 3, 32 to 35 cents, while grade 4 advanced 10 to 15 cents.

In July, 1921, December wheat advanced 21 cents in less than two weeks on the Chicago Board, and in the next 10 days declined 17 cents. In two weeks in August it declined 15 cents, and in the following two weeks ending September 9 advanced 22 cents. Between September 9 and 26 it declined 17 cents, and in the next ten days declined 11 cents more.

In 1922 May wheat advanced 30 cents on the Chicago Board in February, declined 20 cents in March, and by April 22 had advanced 20 cents. In the last half of May it dropped 31 cents. On May 11 the directors of the Board of Trade made wheat in cars on track deliverable on May contracts pursuant to what is known as the emergency delivery rule of the Chicago Board of Trade. The sudden drop of 31 cents was no doubt due to forced sales occasioned

by the application of the emergency delivery rule, as there were then 4,700 cars of wheat on track in Chicago which could not be unloaded owing to lack of available public elevator space.

The sale of contracts for grain for future delivery on the Chicago Board of Trade annually involves from fifteen to twenty billion bushels of grain. The Board of Trade absolutely prescribes all the conditions for the delivery of grain on these vast transactions.

An exhaustive study of its ordinary rules for delivery of grain on these infinite future contracts discloses that normally, before any grain can be delivered, it must be: First, within the switching limits of Chicago; second, actually stored in one of the few Chicago elevators or warehouses previously designated for such purpose by the Board of Trade; third, that receipts of such warehouses for such grain shall be deliverable exclusively in the fulfillment of these contracts. The total grain-holding capacity of all these designated warehouses does not exceed 12,950,000 bushels (see complainants' bill of complaint). Obviously, these delivery rules exclude from delivery all grain otherwise available for delivery which is or may be stored in other warehouses located in Chicago whose total storage capacity exceeds 30,000,000 bushels, as well as all the available grain stored in any warehouse located at any other terminal market throughout the country. The requirement that only that part of the country's grain supply which has procured storage in one of the limited

number of regular warehouses in Chicago shall be available for delivery is both artificial and arbitrary. The disproportion between the great volume of grain sold for future delivery and the extremely limited physical facilities provided by the exchange for delivery is shocking and is utterly inconsistent with complainants' contention that the makers of these contracts seriously contemplate either the actual or constructive delivery of the grain involved in them.

The creation and maintenance of these unnecessarily restricted delivery rules by the Board of Trade convincingly evinces a deliberate intent on the part of the exchange to discourage and hinder, rather than to encourage and promote, delivery upon these future contracts and strikingly attests that the real purpose of these arbitrarily narrow delivery rules is to make price fluctuations in grain futures as far as possible dependent upon the local, rather than upon world or country wide, grain conditions and prospects. The emergency rules whose very existence conclusively discloses an admission on the part of the exchange that the ordinary rules of delivery are inadequate are also deceptive and ineffective because they only operate in the discretion of the directors of the exchange and are designed to punish manipulation and break corners rather than prevent these evil practices. The establishment and maintenance of delivery rules which prevent the delivery of eligible grain stored in numerous warehouses in the city of Chicago clearly hinder delivery and inevitably create conditions with

respect to delivery which are readily susceptible to manipulation and the practice of cornering on the part of powerful speculative interests. Such narrow rules for delivery attract speculation, precipitate violent price fluctuation, and invite manipulation and corners.

These delivery rules are a clever piece of legal camouflage designed to conceal the great quantity of sheer speculation in grain which is continuously present in the future trading operations on the Board.

It is submitted that these rules show on their face that they were framed to accommodate, and that they do accommodate, the wishes of a majority of those who buy and sell future grain contracts.

> "Speculators do not want delivery."
> "Hedgers do not want delivery."
> "Millers seldom want delivery."
> (Pages 183, 184, 185, Report of the Federal Trade Commission on The Grain Trade, Vol. 5, Sept. 15, 1920.)

There are other rules such as those fixing the grades deliverable and the price discounts which manifestly operate out of harmony with cash grain market conditions.

SUSCEPTIBILITY TO MANIPULATION.

The future trading system as operated under the existing rules of the exchange is peculiarly susceptible to manipulation. Undoubtedly sufficiently large speculative purchases or sales of futures contracts produce artificial price fluctuations. As the price

effect of such trades depends upon the conditions surrounding the market necessarily the volume of the speculative trades which will produce such results can not be definitely known. It is known that frequently individual traders deal in contracts involving many million bushels of grain and usually such vast transactions temporarily at least raise or lower the price of grain above or below the price level of actual supply and demand. The rules of the exchange do not restrict the amount of trading which may be done by any interests or combination of interests, nor provide authority for ascertaining the amount of trading which is being done by any person or persons. The failure to provide such rules shows that the exchange has not effectively exerted its regulatory power to safeguard its machinery from the manipulative practices of powerful speculative interests which may be disposed to exploit it for selfish purposes. These vulnerable conditions are illustrated by the following excerpts:

> Mr. VOIGT. Suppose we create no such agency, but simply pass a law prohibiting any person or any interest from having outstanding at any one time a speculative interest exceeding, say, 2,000,000 bushels. Would not that prevent manipulation of the market?
>
> Mr. HOOVER. It might. There might be some occasions when the amount of trading was so small that 2,000,000 bushels of a speculative transaction directed to influence the price would be overpowering in the market.

Mr. VOIGT. Can you conceive of a trade of 2,000,000 bushels by any individual in the Chicago market by selling futures that would seriously affect the market?

Mr. HOOVER. I should think it actually possible for 2,000,000 bushels in one day to affect the market on some days. Generally speaking, I do not think that 2,000,000 bushels would enable anyone to affect the price. All I am contending is that there is probably no definite figure that could be arrived at by a discussion in these rooms that would be flexible at all times and under all conditions.

Mr. VOIGT. That may be true, but if you had a rigid law preventing any interest from exceeding the limit of 2,000,000 bushels in a purely speculative venture we might do some good, and we could not possibly do any harm. Is not that true?

Mr. HOOVER. I presume it would do some good.

(Page 919, Future Trade Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3d Session.)

SECRECY AS AN ADVANTAGE AT CHICAGO.—Another reason put forward as a ground for preferring the present system is that it facilitates the concealment of very large buying or selling orders. When the subject of a better clearing system was up for consideration in 1904 one of the chief objections raised was that because of it the clerks in the clearing house would be enabled to determine how the big interests stood. (Citing Taylor's History, page 1073.) Legal objections were also raised

as regards showing the origin of large orders and large open interests. (Page 242, Vol. 5, of the Report of the Federal Trade Commission on The Grain Trade.)

FALSE AND MISLEADING REPORTS.

False and misleading reports concerning market conditions which influence the price of futures are sent out by the members of the exchanges over their private wires and otherwise in interstate and foreign commerce. The Federal Trade Commission says (page 70, Vol. 5 of its Report on The Grain Trade), concerning such information, that it is "ephemeral," sent out without consideration and with little inclination to hold back anything that is interesting, and much of it is naturally nothing more than rumor, while some of it is "doubtless sheer invention, and often dishonest invention, to influence prices to some one's advantage." It further says (page 76), under the head "Circulation of False News and Advice" and "The Censorship at Chicago Not Efficient" (page 79);

> One firm was on occasion exhorted not to give unverified rumors the standing they acquire by being put out over its wires. To pass on exaggerations is obviously not fair. If statements can not immediately be checked, they should be put out in a form to afford the possibility of checking. False or exaggerated statements often relate to sales for export and to alleged purchases in Argentina, or shipments from there. On one occasion

a member was sharply rebuked for reporting wheat fields "badly damaged" by a kind of frost that does not injure wheat. Of late, of course, military and political events have frequently been the basis of startling rumors. It does not appear that the "trade" has adopted the view that sensational reports are not good on their face, and that their use unverified and unqualified is a specie of dishonesty.

At least one case has transpired in which a member was strongly recommending the bear side of the market to those who would read his circular latters, when, as it appeared later, he was himself buying heavily. Reports and statements designed to influence the market in the opposite direction from one's own belief, as proved by one's action in the market, are so flagrantly dishonest that they might properly be made a felony. It does not appear that the Chicago board of directors did anything more than reprove the member apparently guilty of the conduct described. (Pages 76–77.)

THE CENSORSHIP AT CHICAGO NOT EFFICIENT.—The so-called censorship at Chicago adds considerably to the duties of the Secretary as a letter writer. The lesser importance of futures and of speculation on other exchanges means that the situation is not so exacting elsewhere. Evidence of anything more than letter writing at Chicago, at least of actual punishment of offenders, as distinguished from summons before the board of directors for explanations, is lacking. In

relation to one phase of the censorship, the Secretary himself refers to the "admonitions of the market reports committee having become valueless."

Perhaps if the problem were approached from another viewpoint the censorship would be more effective. Hitherto the underlying idea has been to "avoid giving offense to our enemies." In other words, these things are offensive to the public, and the Board tries to do some disinfecting or deodorizing. If the majority sentiment of the Board were opposed in principle to the seeking of commission earnings by its members where the presumption is that a disservice rather than a service is performed for the customer, then it might deal more effectively with attempts of commission houses to get as much as possible of such business by stimulating trade not merely through sensational news but by advice tending to keep customers moving "in and out" of the market. (Page 79.)

THE BURDEN ON INTERSTATE COMMERCE.

The manipulation, corners, and violent or unusually wide fluctuations in prices which have occurred on the Chicago Board of Trade have drawn vast quantities of grain to that market out of their wonted channel, to the detriment of both interstate and foreign commerce. Railroad cars and vessels required for the transportation of other essential commodities were used in this unnecessary and burdensome hauling. Unessential traffic is especially bur-

densome to commerce when our transportation facilities are crippled as they have been for several years on account of the war.

A notable instance of such diversion resulted from the Leiter deal in 1897. Vast quantities of wheat which had started to foreign markets were brought back to Chicago for delivery purposes and subsequently reshipped to foreign markets. Short interests at a very great expense chartered tugs to break the ice so that ships could bring grain from Winnipeg, Duluth, and other Northern points to Chicago to break the Leiter corner. The details of this are stated in Taylor's History at pages 945 and 946, Volume II.

The May, 1922, wheat deal attracted to Chicago vast quantities of grain which normally either were needed for consumption in other localities or should have gone out through Gulf points to foreign markets. Julius H. Barnes, speaking of this in his testimony at the hearing held by the Federal Trade Commission in New York on October 6, 1922, said:

> Those large cash interests in Chicago began to collect wheat all over the country and head it to Chicago for delivery at these attractive prices, which by this time had reached a relation in respect to all of the markets which attracted wheat from every direction to Chicago.
>
> The result of that was that by the end of the month there was accumulated in Chicago a stock of ten or twelve million bushels of wheat, which was beyond the normal absorb-

> ing capacity of the consumption trade that rests on Chicago, and that wheat had been lifted by the incentive of these apprehensively made prices from centers where it should have remained for the consumption which normally overtakes it from those centers—Omaha, Kansas City, Minneapolis, all these other points. So that the country stock which should normally supply mills west of Chicago or south of Chicago were lifted out of their natural place and directed to Chicago by these apprehensively made prices, and there was collected in Chicago an almost unsalable quantity of wheat, which could only press in one direction, could not go back (pp. 75 and 76).

In a letter of May 13, 1922, to the Chicago Board of Trade (p. 69, Grain Futures Hearings Before Committee on Agriculture and Forestry, United States Senate, 67th Congress, 2nd Session, on H. R. 11843) he said:

> Present conditions lay an economic burden on distribution cost by drawing wheat to Chicago out of its accustomed channels and from points of supply needed shortly for actual consumption elsewhere. These evil effects are solely from apprehension of a forced settlement at artificial prices on hedges properly used as insurance on price level fluctuations.

The members of the Exchange extensively and continuously use the mails and the telegraph, telephone, and other means of interstate communication in their solicitation of business outside of the State of Illinois. They operate private wires and maintain

in cities and towns in the different States branch offices for the purpose of procuring orders and facilitating their execution at Chicago. The larger part of the "futures" contracts executed on the Board of Trade are made by member brokers for persons living outside of the State of Illinois and in other States and foreign countries who are the principals and real parties in interest in such transactions. No rule or practice of the Exchange, which attempts to make the broker members the principals to such contracts, can strip such transactions of their real interstate character.

Should, as claimed by complainants, the ringing-out system practiced by the members of the exchange with respect to customers' contracts have the legal effect of extinguishing the contract made by the broker for his customer, such extinguishment necessarily would leave the broker occupying both the legal and practical relationship of bucketing the customer's order, as the customer's contract with him requires that the broker shall not only make such purchase or sale on the exchange for him, but shall retain such outstanding contract for his account until the settlement thereof. *Irwin* v. *Williar*, 110 U. S. 499, 515; *James* v. *Clement* (C. C. A.), 223 Fed. 385, 400, applying the *Christie case* (198 U. S. 236). The cancellation of margined contracts by the set-off or ring system, as well as the custom of requiring additional margins as the price moves up or down, which represent profits to the successful party to the contract,

and the retention of such moneys until final settlement accumulates large trust funds in the commission man's hands, much of which belong to their customers outside the State of Illinois. Many commission men have not resisted the temptation to speculate with these trust funds. It is known that frequently customers have suffered great losses through failures caused by the brokers speculating with these funds. The unbonded handling of such large trust funds both invites and justifies the strictest kind of government supervision.

Necessarily such contracts are made pursuant to orders which are transmitted through the mails or across State lines by telegraph, telephone, or otherwise. These contracts at their inception and during their pendency require the deposit of original and recurring margins amounting to millions of dollars, and at their conclusion require settlements involving large remittances. These margins and remittances are forwarded to and from Chicago through the mails and across State lines by telegraph, telephone, and otherwise and constitute a constantly recurring course of business.

Such of these transactions as are bona fide are by intent of the parties as well as in legal contemplation directly connected with the country's grain supply, because under the delivery rule of the Exchange some of the country's actual grain must upon demand or offer be delivered upon them at Chicago. The rules of the Chicago Board of Trade do not provide

that the grain which shall be delivered upon any of these contracts shall be grain grown in the State of Illinois or grain shipped in from other States which has become incorporated with the mass of property in the State of Illinois; but on the contrary authorize the delivery of such grain as shall be stored in elevators made regular by the complainant. The records show that much of the grain stored in these regular warehouses is grown in other States and shipped to and through Chicago on its interstate journey to points of consumption in other States and foreign countries. Obviously the grain employed in making these deliveries upon which the legality of the "futures" contracts absolutely depends is a large but indistinguishable part of that great continuous stream of interstate grain which goes to and through Chicago in its search for world-wide markets. A printed statement emanating from the Chicago Board of Trade says:

> In the last sixty-five years a total of over 12,500,000,000 bushels of grain has been received and 10,000,000,000 bushels shipped out of Chicago. * * *
>
> HEDGING IS PRICE INSURANCE.
>
> With the natural expansion of the industry it became necessary to deal in contracts for future delivery of grain in order to properly facilitate the vast commerce which extends around the globe.
>
> While other organized exchanges handle large quantities of certain grains, practically

> the entire world looks to Chicago as the central futures market. Here a hedging contract may be consummated whether the grain to be insured is on the farm, in a country elevator, stacked on a foreign dock, or being moved across the sea.
>
> Such a contract protects against sudden price changes due to adverse weather or transportation difficulties or the score of other factors entering into the marketing of grain. The producer can sell a futures contract and then deliver the grain at his convenience. The country buyer can hedge, or insure by a sale for future delivery and, being protected against loss, is enabled to pay a higher price to the grower than if he were to carry the risk of price fluctuation himself. Miller and exporter likewise use future contracts to obtain the insurance against loss.

Statistics show that approximately 250 million bushels of grain are shipped into Chicago annually and that fully eighty per cent thereof is shipped with the expectation that it will be, and it is actually, sent on into other States and foreign countries. A very large part of this grain, both from Illinois and other States, moves on a through freight rate commonly known as the Illinois Proportional Rate, which allows such grain a temporary stop-over in Chicago for marketing and processing purposes, pending shipment to eastern destinations. *Bacon* v. *Illinois*, 227 U. S. 504.

The foregoing facts show that these futures contracts are in a physical sense directly, intimately, and

inseparably connected with grain which is a part of the current of interstate commerce in grain, whereby grain is sent to Chicago from one state with the expectation that it will end its transit after purchase in another state.

It is admitted that the success and probably the existence of the futures trading system in grain depends upon a large volume of speculative transactions, obviously much larger than that which is or can be supplied by the people of Illinois, and that its maintenance depends upon the patronage of other states and foreign countries. Both the Exchange and its members gather from and distribute in other states and foreign countries a large volume of information pertinent to crop and market conditions.

The Exchange causes to be collected, every business day, the first price and each change in price made in the contracts for present and future delivery, which are entered into by its members in its exchange hall during its established business hours, and causes such quotations to be delivered in the City of Chicago to certain telegraph companies for compensation and with the understanding that such telegraph companies may transmit and distribute them through the country and throughout the world. The world-wide distribution of the prices at which these futures contracts are made has long since become a material, if not a dominant, factor or influence in determining the price of cash grain throughout the country and the world, as well as actual grain sold for deferred shipment. These prices,

and their immediate publication, create a national and world-wide psychological effect which exerts such a strong influence over both the buying and selling side of the merchandising of grain that no intelligent grain dealer will ordinarily buy or sell grain except in small quantities for immediate use or disposition without reference to and substantially in harmony with such prices.

The price influence and effect exercised by futures quotations which are sent out from Chicago are strikingly illustrated by the following facts: Usually quotations for three different months are carried simultaneously; for instance, in September the Board disseminates prices for September, December, and May deliveries. In some years in the month of September the "futures" prices for December and May deliveries are substantially higher than the current cash prices of grain, while in other years the December and May prices are substantially lower than the September price. When the December and May "futures" prices are higher than the cash price in September such relationship between such prices furnishes what is known to the grain trade as a carrying charge and creates a merchandising condition in the grain trade which enables the merchant-storers of grain, such as the great terminal elevators, to buy grain in September for storage and sell corresponding amounts of December or May futures. The difference between the price paid for the cash grain and the higher price at which it is hedged eliminates the merchandising risk and assures a reasonable storage compensation. Such

conditions stimulate storers of grain, who necessarily hold the grain from the period of harvesting to the period of consumption, to purchase grain freely. However, when the futures price is lower than the cash price of grain, such condition necessarily eliminates the carrying charge and naturally tends to discourage the great terminal elevators and other storers of grain from purchasing it. The fact that these different conditions have existed in different years clearly demonstrates the tremendous influence which future trading has, does, and may exert on grain prices.

Everywhere the forward quotations on distant delivery months notoriously influence the grain market. Again, data gathered by the Federal Trade Commission from 8,578 warehouses and elevators largely located in the northwestern grain belt of the country in which hedging is most extensively practiced shows that nearly fifty per cent of these warehouses and elevators hedge their grain purchases. Necessarily, whenever "futures" quotations are lower than current cash grain prices, such price relationship tends to discourage grain purchases on the part of merchants, because the profit-hedging facilities do not exist. It is also true that when grain prices are quoted to foreign countries, the trade usually bases its offers on the futures prices.

Approximately twenty to twenty-five per cent of the interests which buy grain from the farmer at country points hedge such transactions. As such

purchasers contemplate shipments for sale to the terminal market within thirty, sixty, or ninety days, at least, purchases made at such points in July, August, and the early part of September are made with reference to the September futures. Those made in October, November, and the early part of December are based upon the December futures. Similarly, purchases made in other months are based upon the nearest futures prices. Under such circumstances, the status of the futures price employed directly and materially affects the price which is paid the producer at the country point tending to stimulate or depress the country price according to whether such futures price is higher or lower than the current cash price at the nearest terminal market. When the futures price is higher than current terminal cash prices, that condition tends to enhance the farm price of grain because such condition furnishes ideal insurance facilities through hedging. On the contrary, when current cash prices are higher than such futures prices, the insurance facility is greatly impaired and results in tending to lower farm prices in order to cover the increased risk of merchandising grain from the country station to the terminal market.

It is admitted that there is an arbitrary variance between cash and futures prices, and that sometimes cash prices are higher while at other times they are lower than futures prices. An arbitrary price variation exists because there is a widespread

and well-supported prejudice against the quality of grain which may be delivered in fulfillment of a futures contract as well as a pervasive suspicion that the cash differential allowed by the rules of the exchange on some of such deliveries is not exactly fair to the purchaser who in many cases recognizes this but takes account of it in the purchase price. That cash prices are alternately higher and lower and frequently unreasonably so than futures prices is merely a result of the persistent effort which is continuously going on through future trading to create price fluctuations for the purpose of attracting speculative transactions. A raid on the futures market temporarily depresses such prices below the supply and demand price level, while a formidable buying campaign lifts the futures price above such level over more or less protracted periods of time. A careful comparison of contemporary cash and futures prices over a period of time shows that whenever there is a sustained substantial change in the price of futures, such change is inevitably substantially reflected in cash prices. While such prices do not move along precisely parallel lines, the trend of the futures is approximately followed by the cash.

COMMITTEE REPORTS.

The foregoing and much additional evidence of the same character was before the Senate and House Committees when they made their reports to Congress concerning The Future Trading Act and The Grain Futures Act. The House Committee, in its

report on The Future Trading Act (H. R. Report No. 44, May 4, 1921, 67th Cong., 1st sess.) said: "Scores of witnesses were heard by the Committee." The Senate Committee, in its report (Sen. Report No. 212, July 8, 1921, 67th Cong., 1st sess.) on the same act, said:

> Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating and not a stable market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to the best advantage. A market without wide and frequent price fluctuations would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed for buying in the country. Also, when prices are fluctuating, as they have done for several months past, consignments of grain from country points to the terminal markets are more likely to find the bottom price of the day's price than the top. Fluctuations between the scalper, whether in the pit or at the cash grain tables, but work against the producer.

> Furthermore, manipulation on the "short" or selling side of the market by big speculators, and "bear raids" by their followers, such as happen every year shortly before or immediately following harvest, play directly into the hands of European importers, who are enabled to buy millions of bushels of wheat in the futures market at a reduced price, which they later exchange for cash wheat.

The House, in its report (H. R. Report No. 1095, June 13, 1922, 67th Cong., 2d sess.) on The Grain Futures Act, speaking of the hearings on The Future Trading Act, says:

> Producers, representatives of the exchanges, members of the exchanges, and others thoroughly familiar with the regulations of the exchanges were heard for several weeks, appearing before the Committee on Agriculture of the House and the Committee on Agriculture and Forestry of the Senate. This same committee conducted those hearings in the House, and thus became thoroughly familiar with the subject matter covered by this bill. * * * This bill attempts to prevent and remove obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges, the committee having found from all of the evidence, both at these and prior hearings, that transactions in grain involving the sale thereof for future delivery as conducted on boards of trade, known as "options" and "futures," are affected with a national public interest, etc.

The Senate Committee, in its report (Sen. Report No. 871, Aug. 23, 1922, 67th Cong., 2d sess.) on The Grain Futures Act, says:

> The evidence adduced at the hearings held by this committee and the House Committee on Agriculture, when the former Act and this bill were under consideration, abundantly supports this finding (Section 3) and declaration in every detail. * * *
>
> The far-reaching effect which transactions in grain futures exert or are capable of exerting on interstate and foreign commerce in grain thus becomes apparent, and it is equally clear that fluctuations due to manipulation are detrimental to farmers, dealers, and consumers. That manipulation occurs is known to every one familiar with the grain trade and is established by the testimony taken at the hearings. Sudden and unreasonable fluctuations frequently occur as a result of manipulation, which, although profitable to the manipulator, are detrimental to the producer and the consumer and the persons who handle grain and its products and by-products in interstate commerce. These fluctuations make the business of dealing in grain and its products and by-products in interstate commerce hazardous from time to time and therefore an obstruction to and burden upon interstate commerce in grain. * * *
>
> The fluctuations in prices which have occurred since the court held the regulatory features of the future trading act unconstitutional have strengthened the farmer in his

> belief that prices have been manipulated to his great disadvantage. From May to August, 1922, the price of wheat declined more than forty cents a bushel, notwithstanding a world statistical position indicating that consumptive requirements will be in excess of available supplies and a large part of the exportable surplus of the United States has already been sold. It is generally believed by the producers and the public that the severe decline at the beginning of the present crop movement was largely caused by "short selling" by professional speculators in volume which amounted to manipulation of the market, although the exchanges have contended that the decline has been largely due to heavy volume of hedging sales.

The evils and abuses on the exchanges prompting the legislation are pictured in the statement (Cong. Rec. Vol. 61, pp. 5220–5227, 67th Cong., 1st sess.) of Senator Arthur Capper, United States Senate, August 9, 1921, on the provisions of The Future Trading Act.

JUDICIAL NOTICE.

The court is not limited to the special evidence introduced at the committee hearings on The Grain Futures Act and The Future Trading Act, but may consider whatever general information was available to Congress. This opens a broad field of statistical and historical data for judicial review, as the character and functioning of grain exchanges have been under investigation and discussion for many years and much literature has been published

about them. The court will indulge the presumption that Congress was familiar with all this data and that the Members thereof possessed information which was acquired through practical experience. In *Stafford* v. *Wallace*, 258 U. S. 495, the court said:

> It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us, in interpreting the effect and scope of the Act, in order to determine its validity, to know the conditions under which Congress acted. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.
>
> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

Letters as well as statements found in the committee hearings and reports may be noticed. *The Delaware*, 161 U. S. 459, 472. In that case the court noticed a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury "as a part of the history of the times."

The court will notice the reports of the Federal Trade Commission. *Temple* v. *United States*, 248 U. S. 121, 130.

The court may recur to the published history of the times in order to ascertain the reason of the law as well as the meaning of a particular provision therein. Article on Statutory Construction, Vol. I, Fed. Stats. Ann., 2nd Ed., p. 61. It may take notice of general writings on the subject. *Fenton* v. *State*, 100 Ind. 598.

The courts generally notice the existence of grain exchanges, their methods of transacting business, the trade usages and customs prevailing thereon, and the relation existing between such exchanges and the marketing and distribution of the country's grain crops, as well as the relation existing between such exchanges and the movement of grain in the channels of interstate and foreign commerce. The court may resort to available statistical and historical data for the purpose of informing itself as to the actual conduct and business practices of the exchanges as well as the practical effect upon the marketing of grain and the economic conditions of the country.

The Supreme Court of North Dakota, in *Green* v. *Frazier*, 176 N. W. 11, 19, comprehensively reviewed the system of transporting and marketing grain and also the effect which such system of marketing had upon the farm price of grain. This court, in *Green* v. *Frazier* (253 U. S. 233, 241), says the Supreme Court of North Dakota—

> estimated from facts of which it was authorized to take judicial notice that 90% of the wealth produced by the State was from agriculture and that upon the prosperity and welfare of

> that industry other business and pursuits carried on in the State were largely dependent. * * * The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources amounted to $55,000,000 to the wheat raisers of North Dakota.

THE LEGAL EFFECT OF THE FINDING.

The finding made by Congress in The Grain Futures Act will not be disregarded by the courts except upon a very clear and positive showing that it is wholly unsupported by the facts. This seems to be the obvious effect of numerous court decisions.

A similar finding is made in the recent Act of Congress approved September 22, 1922 (Public—No. 348—67th Congress), providing for the appointment of a Federal fuel distributor, and a precedent for both is found in the Lever Food Control Act of August 10, 1917, 40 Stat. 276. The Supreme Court of Massachusetts recently had occasion to pass upon the effect of the declaration in the Lever Food Control Act in the case of *Lajoie* v. *Milliken*, 136 N. E. 419, in which it said:

> The declared purpose of a legislative enactment is to be accepted as true unless incompatible with its meaning and effect. There is no rational ground for doubting that the purpose of the so-called Lever Act as thus declared was true and genuine (p. 423).

Camas Stage Co. v. *Kozer* (Oregon), 209 Pac. 95.

In *Booth* v. *Illinois*, 184 U. S. 425, 429, the Supreme Court said:

> If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

In *Ex parte Young*, 209 U. S. 123, 165, the court said:

> An act of the legislature fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary.
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156;
>
> *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210.

In *Price* v. *Illinois*, 238 U. S. 446, 452, the court said:

> The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was

> unquestionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided.

In *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357, the court said:

> It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chi., Burl. & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452.

Respecting the emergency declared by the District of Columbia Rents Act, the Supreme Court, in *Block* v. *Hirsh*, 256 U. S. 135, 154, said:

> No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. *Shoemaker* v. *United States*, 147 U. S. 282, 298. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 606. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227. *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 230. But a declaration by a legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.
>
> *Levy Leasing Co.* v. *Seigel*, 258 U. S. 242, 246.

In the recent decision of the Supreme Court in *Stafford* v. *Wallace*, 258 U. S. 495, under the Packers & Stockyards Act, 1921, the court said:

> Whatever amounts to more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily

for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

THE GRAIN EXCHANGES DEALT WITH BY THE ACT ARE NATIONAL PUBLIC UTILITIES.

The Court in its decision in the *Munn case*, 94 U. S. 113, unmistakably declared that a business may become affected with a public interest and in that event is subject to legislative control. There the Court said:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use (p. 126). Enough has already been said to show that when private property is devoted to public use it is subject to public regulation (p. 130).

In *House* v. *Mayes*, 219 U. S. 270, the Court said:

> The Board, in the management of its affairs has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the State necessary or needful to protect the people against unfair practices that may likely occur from time to time. * * * If such State regulations are not unreasonable—that is, not simply arbitrary, nor beyond the necessities of the case—they

are not forbidden by the Constitution of the United States (pages 284–285).

The recent case of the *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411, says:

> The cases need no explanatory or fortifying comment, they demonstrate that a business, by circumstances and its nature, may arise from private to be of public concern and be subject, in consequence, to governmental regulation. * * * "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation" * * *. It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and can not be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that Government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than Government possesses to-day.
>
> *National Union Fire Insurance Co.* v. *Robert Wanberg*, decided by U. S. Supreme Court, November 13, 1922.

Is the business conducted by the Grain Exchange upon which future trading is carried on within the foregoing principle of law? In 1859 the Chicago Board of Trade sought, obtained, and accepted from the State of Illinois a charter making it a body politic and corporate and through said charter ac-

quired quasi public and judicial powers, including the power to subpœna witnesses, administer oaths, and make awards, which awards when filed in court have the force and effect of a judgment; the power to appoint one or more persons to examine, measure, weigh, and inspect flour, grain, and other articles of produce dealt in by the members of the Board with a provision that the certificate of such person or persons as to the quality or quantity of any such article shall be evidence between buyer and seller of the quantity, grade, or quality of the same, and shall be binding upon the members of the Board and others interested; the power to make and establish rules, regulations, and by-laws for the management of its business, and the power to inflict fines upon any of its members and collect the same for breach of its rules, regulations, or by-laws. Pursuant to such powers the Chicago Board of Trade provided the facilities and equipment necessary for the weighing, sampling, grading, and marketing of the grain received at Chicago by its members, equipped a future trading system, and began to gather and disseminate throughout the country data pertaining to the grain crop and its market conditions, and to disseminate through the channels of interstate and foreign commerce quotations resulting from the dealings in futures carried on by its members. The Chicago Board of Trade and its members solicited grain growers and dealers in neighboring States to ship their grain to the members of the Board for sale, and

solicited millers, merchants, and exporters everywhere to buy such grain from its members. From 1859 to the present time farmers and local elevators throughout the country have been continuously consigning their grain to members of the Board for the purpose of sale, and its members have received and handled such grain. Both the Board and its members have continuously since 1859 solicited farmers, elevator men, grain dealers, millers, and exporters everywhere to use the facilities of the Exchange for hedging purposes and have solicited the public generally to use such facilities for speculative purposes. They have generally invited public patronage and have charged and collected self-fixed commissions for services rendered. The performance of these vast and intricate fiduciary services for the public for compensation over such a long period of time has made the public dependent upon the Exchange and its members in the matter of marketing its cash grain, and hedging against price fluctuations, and in a practical sense has enabled the Exchange and its membership to acquire monopolistic control over the great cash and futures grain market which has been built up in Chicago. *United States* v. *St. Louis Terminal*, 224 U. S. 383, 405. The manner in which the Chicago Board of Trade and its membership have devoted themselves to the public service with respect to the marketing and hedging of the country's grain crop demonstrates that the Exchange has such close and constant relations with the general public that its business has become a National public utility.

The facts recited fully support the decision of the Supreme Court of Illinois, which holds that the Chicago Board of Trade has become affected with a national public interest. That court in *New York and Chicago Grain and Stock Exchange* v. *The Chicago Board of Trade*, 127 Ill. 153, 2 L. R. A. 411, said:

> It has been said, and with much show of reason, that the floors of this exchange hall stand in the gateway of commerce. * * *
>
> Four-fifths of the grain and provisions produced in the States and Territories of the Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs, and meats for the extensive territory that is tributary to Chicago, and seriously affects and to a considerable extent controls the values of the necessaries of life throughout the United States and the civilized world.
>
> For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world.
>
> The great power and influence which the board possesses in dictating market values is owing to the vast aggregation of products which are drawn to its portals for a market

> and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business, though in form and as between the members the mere private and individual dealings of such members, is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal.
>
> * * * * *
>
> In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the Board of Trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the Board of Trade and the telegraph companies (p. 414).

The Supreme Court of Illinois, in referring to this case in a later decision in *American Livestock Commission Company* v. *Chicago Livestock Exchange*, 18 L. R. A. 190, 200, said:

> By this means (the compiling and furnishing of market quotations) the business of buying and selling agricultural products throughout the entire country had been brought under the control of the market prices fixed and determined on said board. * * *
>
> But when the Legislature, acting upon a competent statement of facts, has interposed

> and declared the business to be *juris publici*, all difficulty is removed.
>
> * * * * *
>
> These facts (the magnitude of the business of the Livestock Exchange) would doubtless be sufficient to warrant the Legislature, in the exercise of its legislative discretion, in declaring a public use, and placing said business under legal control and supervision; but such power, in our opinion, does not rest with the courts.

The Court knows that the grain exchanges at the terminal markets are as essential to the marketing of grain as stockyards are to the marketing of livestock.

THE POWER OF CONGRESS.

We have already shown in our main brief that Congress has plenary regulatory power over everything moving from one State to another, and particularly so when the transportation is for hire and involves the use or employment of the mails or the telegraph, telephone, or other facilities of interstate commerce. All the decisions of this court establish the principle in our constitutional law that the power of Congress to regulate interstate commerce is a broad and complete power, acknowledging no limitations except those contained in the Federal Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1. The extent to which this regulatory power may be exercised is determined by the character of the subject matter which is to be regulated and always extends to prohi-

bition when necessary to protect the health or morals of the public and to restrain the perpetration of fraud or deceit. Congress has prohibited the shipment in interstate commerce of (1) meat which has not been inspected, examined, and marked "inspected and passed," Act of March 4, 1907, 34 Stat. 1256, 1260; (2) nursery stock in violation of a quarantine, Act of August 20, 1912, 37 Stat. 315; (3) birds or animals killed in violation of a State law, Section 242 of the Criminal Code of the United States; and (4) unmarked renovated butter, Act of May 9, 1902, 32 Stat. 193. This court has uniformly approved Acts of Congress prohibiting the shipment from State to State of (1) adulterated or misbranded foods or drugs, *Hipolite Egg Company* v. *United States*, 220 U. S. 45; *Weeks* v. *United States*, 245 U. S. 618; (2) diseased cattle, *Reid* v. *Colorado*, 187 U. S., 137; (3) women for immoral purposes, *Hoke* v. *United States*, 227 U. S., 308; *Caminneti* v. *United States*, 242 U. S. 470; (4) liquor in violation of the laws of the State into which carried, *In re Rahrer*, 140 U. S. 545; *Clark Distilling Company* v. *Western Maryland Railroad Company*, 242 U. S. 311; *United States* v. *Dan Hill*, 248 U. S. 420; (5) obscene literature and articles for immoral and indecent purposes, *United States* v. *Popper*, 98 Fed. 423; (6) demoralizing picture films, such as prize fighting, *Weber* v. *Freed*, 239 U. S. 325; and (7) lottery tickets, the *Lottery Case*, 188 U. S. 321.

In the *Dan Hill case* the court said:

> Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress, acting independently of the States, may induce legislation without reference to the particular policy of law of any given State. Acting within the authority conferred by the Constitution, it is for Congress to determine what legislation will attain its purpose. Page 425.

In the *Lottery Case* the court extensively reviewed the power of Congress to prohibit the introduction into interstate commerce of everything which is or may be prejudicial to the health, morals, or safety of the public. In that case the court said:

> Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. Page 348, quoting from the *Passenger Cases*, 7 How. 283.
>
> Since the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Page 350, quoting from *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1.
>
> Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.

Page 351, quoting from *County of Mobile* v. *Kimball*, 102 U. S. 691.

In *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356, the court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons and the transmission by telegraph of ideas, wishes, orders, and intelligence. (Pages 351–352.)

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." (Page 352.)

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another. (Page 353.)

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States. (Page 354.)

We have said that the carrying from State to State of lottery tickets constitutes inter-

state commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, *a prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States? (Page 355.)

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress can not be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen* v. *Virginia*, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when

placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals nor excuse its failure to perform a public duty by saying that it has agreed, by legislative enactment, not to do so. (Pages 355–356.)

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? * * * What clause can be cited which in any degree countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? * * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element

that will be confessedly injurious to the public morals. (Pages 356–357.)

Besides Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. * * * We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. (Pages 357–358.) * * * If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation.

> It is a kind of traffic which no one can be entitled to pursue as of right.
>
> That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it can not be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another. (Page 358.)
>
> We decide nothing more in the present case than that lottery tickets are subject of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that * * * Congress * * * has plenary authority over such commerce and may prohibit the carriage of such tickets from State to State. (Page 363.)

The first prohibition in Section 4 of The Grain Futures Act applies to the delivery for transmission through the mails or in interstate commerce by telegraph or other means of communication, of any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of any contract of sale of grain for future delivery on or subject to the rules of any board of trade. The second prohibition deals with the making of futures contracts

which are directly connected with interstate grain transactions. There is excepted from both of these prohibitions any such contract in which the seller is the owner or grower of the actual grain or the owner or renter of the land on which it is to be grown, or is an association of such owners, growers, or renters. The first prohibition practically forbids the transmission in interstate commerce of an order for execution on an exchange for the sale of a grain futures contract which is ordinarily purely speculative in character. It discloses that, in the judgment of Congress, the unregulated making of contracts which usually represent speculation injuriously affects the public morals and that Congress intended to assert its power, under the commerce clause, to protect to that extent the public from the evil effects of such transactions. In order to accomplish this purpose Congress withholds the use of employment of the mails from everyone and the facilities of communication in interstate commerce from persons outside of Illinois who may wish to make such a contract upon any exchange which has not been designated as a contract market and subjected itself to the regulations imposed by the Act.

May Congress deny the use of the mails and the facilities of interstate commerce for the purpose of speculation in future trading on grain exchanges? Whether a person may sell on margin a contract for future delivery of a commodity which he does not own for the sole purpose of making or trying to make

a profit upon the transaction raises a question of public policy the determination of which clearly lies within the legislative discretion. The citizen has no constitutional right to make such a transaction when it is shown that such transactions do or may injuriously affect the public interest and the legislature has prohibited the making of such transactions. The effect of such transactions and the extent thereof are matters for legislative investigation and determination. It is submitted that if in the practice of selling grain futures on a margin, even when there is a bona fide intent to buy in the actual grain for the purpose of making delivery and delivery is actually made, Congress should find as a matter of fact that such practice is prejudicial to the public interest, it could forbid the use of the mails and the facilities of interstate commerce for the transmission of orders, confirmations, and quotations in connection with them. In *Otis* v. *Parker*, 187 U. S. 606, this court, in sustaining a provision of the Constitution of California that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void," said:

> The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the Fourteenth Amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts

down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the law.

It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals is not conclusive upon the courts. * * * But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. (Pages 608–609.)

If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth* v. *Illinois*, 184 U. S. 425,

> 429. * * * Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized States. (Page 609.)
>
> Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. (Pages 609–610.)

Undoubtedly both Congress and this Court know that those who make a large part of these futures sales do not make or intend to make delivery thereon but are merely employing the future trading facilities of the exchange for the purpose of speculating in grain, that those who buy a large part of such contracts do not want or expect delivery thereon,

and that many members of the Exchange who solicit the orders for and execute these contracts frequently know that the seller does not mean to deliver and the purchaser does not want or expect delivery thereon (pages 183, 184, and 185 of the Report of the Federal Trade Commission on the Grain Trade). Such knowledge justifies Congress in the conclusion that the future trading system operated by exchanges is employed to a very large extent by speculators merely for the purpose of betting upon price fluctuations in grain. For that reason Congress is authorized to restrain or to supervise and regulate those facilities. The great stream of speculation continuously going on in the future trading on grain exchanges clearly subject them to prohibition or regulation as the legislature may determine. The economic effect alone of such speculation would support prohibitory or regulatory legislation. The moral effect brings such transactions clearly and comprehensively within both the police power and the regulatory power under the commerce clause of the Constitution. It is a notorious fact that speculation has been and is extensively practised on the grain exchanges.

In connection with future trading this court, in the Christie case (198 U. S. 236), says:

> It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. (Page 247.)

In the same case (125 Fed. 161) the Circuit Court of Appeals for the Eighth Circuit said:

> We do not deem it necessary to set forth the details of this testimony, which can be found in the opinion of Judge Thompson in the case of the *Board of Trade of the City of Chicago* v. *O'Dell Commission Co.* (C. C.), 115 Fed. 574. In that case, and in *Board of Trade* v. *Donovan Commission Co.* (C. C.), 121 Fed. 1012, upon consideration of substantially the same evidence submitted in this case, the conclusion was reached that over 90 per cent of the transactions had on the floor of the exchange hall maintained by the Chicago Board of Trade were purely gambling transactions. (Page 168.)

In *Board of Trade* v. *Kinsey Company*, 130 Fed. 507, Judge Baker for the Court of Appeals said:

> Undoubtedly gambling was going on in the exchange hall. (Page 513.)

The extent to which speculation is practiced in future trading on the grain exchanges is shown by the frequent employment of the "stop order" which is designed automatically to limit the trader's loss or profit prior to the maturity of the contract; by the large number of small operators, commonly known as scalpers, who habitually buy and sell grain in small quantities in the pit for quick returns; by the manner in which large speculators and scalpers avoid delivery whenever possible; by the admission in complainant's bill that members and non-members buy or sell grain for future delivery upon

the exchange for the purpose of profiting by the rise or fall of futures prices; by complainant's repeated and persistent admission that ideal functioning of the future trading machinery as an insurance or hedging facility depends upon and must have a large volume of speculative contracts, by the Federal Trade Commission's report that:

> It appears that there is a large volume of future trading (on the grain exchanges) that is mere gambling and involves a great economic waste. The remedy for this lies in congressional action to prevent trading which is essentially gambling. (Page 10 of the Report on Wheat Prices for the 1920 crop.)

And by statements from Senator Capper's speech in the United States Senate, August 9, 1921, on the provisions of the Future Trading Act:

> Some of the evils in the marketing system which this bill undertakes to correct are:
>
> (*a*) Market manipulation by large operators.
>
> (*b*) Promiscuous and unrestricted speculation in foodstuffs.
>
> (*c*) Arbitrary interference with law of supply and demand.
>
> Mr. President, it is against the law to run a gambling house anywhere within the United States. But to-day, under the cloak of business respectability, we are permitting the biggest gambling hell in the world to be operated on the Chicago Board of Trade. The grain gamblers have made the exchange building in Chicago the world's greatest gambling house.
>
> * * *

More than 500 private-wire houses have direct connection with the Chicago Board of Trade, according to the Federal Trade Commission, and it costs $3,000,000 a year to maintain them. Then comes the wire systems of the Chicago brokerage houses, which seek speculative business where they may. * * *

Mr. President, the small gambler in futures has no more chance to win than the small gamester in a gambling house where they use marked cards and loaded dice.

* * * You can hardly imagine the extent of the catch. Some recent instances are impressive.

One is the admitted embezzlement of $1,187,000 by R. J. Thomson, * * *. Thomson is credited with losing a part of this huge sum in operations on the Chicago Board of Trade.

Another is the closing of the Arcola (Ill.) State Bank and the arrest of its president and cashier, father and son, for a shortage of $400,000, due to losses in the Chicago grain pit.

* * * * *

An Omaha grain operator * * *, staked his all in the Chicago Board of Trade's gambling game and lost, then turned on the gas and died.

A widow at Topeka, Kansas, is suing to recover $35,000 lost in grain speculation last spring.

* * * Only a few years ago, after using the money of others in market flyers, and losing it, E. A. Miller, manager of the Farmers' Elevator Co., took strychnine when exposure

came, ending his hopeless efforts to win back these losses.

Elevator managers, I am told, are particularly susceptible to the grain-gambling mania. * * * A. L. Middleton, member of a farmers' cooperative elevator company * * *, testified that so many elevator managers had gone wrong in Iowa that his company had instructed its manager not to use the "hedge," except when requested to by vote of the directors.

This country is strewn with the financial carcasses of thousands of men who have been ruined in the Chicago grain pit. I have had scores of personal letters citing most pathetic cases. The almost constant stream of suicides and embezzlements for this cause in the day's news shows that the board of trade gambling game is widespread and claims many victims yearly.

* * * The effect on the market is certainly harmful, for whether it affects the prices up or down it is an unwholesome and artificial market which is thus created.

* * * I do not want my bread any cheaper if my gain comes from the widow who has gambled away her life insurance money, or from the farmer who has gambled away the savings of a lifetime, or from the bank clerk who has gambled himself into the penitentiary.

Section 4 and Section 9 of the Act, applying to and conditionally prohibiting only the interstate features of future trading, are constitutional without reference to the determination of the question whether the

business done by the Chicago Board of Trade, or that done by its members on the board in the City of Chicago, or the State of Illinois, is inter- or intra-state commerce. Congress has sufficient power over the mails, both as sovereign and proprietor, to permit or forbid, as it sees fit, their employment for the dissemination of any information which is directly or inseparably associated with any business of which speculation is a dominant or material part.

Ex parte Jackson, 96 U. S. 727; In re Rapier, 143 U. S. 110.

In view of the salvo in Section 10 of the Act, Sections 4 and 9 should prevail without reference to the other provisions of the Act, as these sections merely cast upon complainants the duty of refraining from the practises prohibited by Section 4 altogether or to submit to the reasonable conditions imposed by Congress as a condition precedent for the privilege of using the mails and the instrumentalities of interstate commerce for the purpose of carrying on their business in other States.

JAMES M. BECK,
Solicitor General.
R. W. WILLIAMS,
Solicitor for the Department of Agriculture.
FRED LEES,
JOHN M. BURNS,
Assistants to the Solicitor.
B. T. HAINER,
Attorney, Packers and Stockyards Administration.

○

An act entitled "An Act to suppress bucket-shops and gambling in stocks, bonds, petroleum, cotton, grain, provisions or other produce," appears at page 1226. That act was held constitutional in *Weare Commission Co.* v. *People*, 209 Ill. 528.

317. (*Unlawful to keep "bucket-shop" or place for dealing in grain, etc., on margins—Penalties.*) SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That it shall be unlawful for any corporation, association, copartnership or person to keep or cause to be kept within this State any bucket-shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so brought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins; or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any corporation or person, whether acting individually or as a member or as an officer, agent or employee of any

corporation, association or copartnership, who shall be guilty of violating this section, shall, upon conviction thereof, be fined in any sum not less than $200 and not more than $500; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter. And the continuance of such establishment after first conviction shall be deemed a second offense. (J. & A. 3742.)

318. (*Definition of offense.*) SEC. 2. It shall not be necessary, in order to commit the offense defined in section 1 of this Act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the said crime shall be complete against any corporation, association, copartnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, copartnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to so buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and, upon conviction thereof, shall be fined and punished the same as the principal and as provided in section one of this Act. (J. & A. 3743.)

319. (*Requires contracts to be made.*) SEC. 3. It shall be the duty of every commission merchant,

copartnership, association, corporation or broker doing business as such to furnish, upon demand, to any customer or principal for whom such commission merchant, broker, copartnership, corporation or association has executed any order for the actual purchase or sale of any of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom such property was bought or to whom it shall have been sold, as the case may be, the time when, the place where and the price at which the same was either bought or sold; and in case such commission merchant, broker, copartnership, corporation or association shall refuse promptly to furnish such statement, upon reasonable demand, the fact of such refusal shall be *prima facie* evidence that such property was not sold or bought in a legitimate manner. (J. & A. 3744.)

320. (*Makes owner of building liable.*) SEC. 4. Whoever knowingly permits any of the illegal acts aforesaid in his building, house, or in any outhouse, booth, arbor or erection of which he has the care or possession, shall be fined not less than $500 nor more than $1,000; and any penalty so adjudged shall be a lien upon the premises on or in which such unlawful acts are carried on or permitted. It is the intention of this Act to prevent, punish and prohibit, within this State, the business now engaged in and conducted in places commonly known and designated as bucket-shops, and also to include the practice now commonly known as bucket-shopping by persons,

corporations, associations or copartnerships, who ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, petroleum, stocks and bonds. And it shall be the duty, under this Act, of all the judges of the several circuit courts in this State, and of the judges of the criminal court of Cook county, at every regular term thereof, to charge all regularly impaneled grand juries to make due investigation and report upon all violations of the provisions of this Act. (J. & A. 3745.)

(Ill. R. S. 1921, Ch. 38, p. 1226.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., *Appellants*,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY ET AL., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY.

HENRY S. ROBBINS,
Counsel for Appellants.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY.

The Government has found it necessary to file two briefs—one by the Solicitor General—and another—miscalled an appendix—prepared by the Department of Agriculture. That of the Solicitor General discusses mainly the legal ques-

tions covered by our main brief and needs little in reply; that of the Department deals mainly with the economic questions.

One noticeable feature of both of these briefs is their inconsistency with the act which they seek to sustain.

The act itself (sec. 3) asserts only an economic reason for its enactment. Future trading is "affected with a national public interest;" the prices therein are used "as a basis for determining the prices" in interstate commerce; it provides to grain dealers "a means of hedging themselves against possible loss through fluctuations in price." It is to be preserved and made better by Federal bureaucratic control despite the undisputed fact that, as stated by this court in the *Christie* case, "It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn." In short, Congress recognized—as this court already had—that the great benefits accruing to the grain trade from this vast future-trading market could only be realized by the maintenance of an *open* market, to which all speculators might resort, and that it was wholly impracticable for the Exchange to censor all orders coming from the world at large to its "pits" for execution. Thus, the only alternatives are to permit, or wholly prohibit, this future trading, and Congress has adopted the first alternative as its basis for this act.

The Government's briefs—doubtless because they deem the economic ground not sufficient—appeal to the moral ground. Future trading is vicious, as they say, because it affords opportunity for undue speculation by the incompetent, and they cite many decisions—rendered before Board

of Trade *v.* Christie, 198 U. S., 236, —, in which the preponderance of the economic value of future trading was overlooked.

But has not this moral argument become inapplicable here since the *Christie* case, and because of the fact that Congress, when hard pressed for reasons for this act, confined itself to the economic reason and ignored the moral one. This is the more manifest because there is nothing in the act evincing an intention of Congress to prevent or restrict improper speculation by the incompetent. Its only aim is to restrain excessive trading by the big and competent speculators.

In enacting this act, Congress doubtless also realized that the suppression of gambling within a State belongs exclusively to its police power. Congress may aid in the suppression of gambling by denying it the use of the mails and the facilities for interstate communication; but, as pointed out in our main brief, this act discloses no such intention—probably because the farmers would be the first to resent any interruption in the prompt dissemination of the quotations by the telegraph companies—and now by a radio plant owned and operated by the Board of Trade itself.

We shall, therefore, put to one side all that is said in the Government's briefs respecting or bearing on the moral question.

The Solicitor General's brief relies on the decision in *Stafford* v. *Wallace* and expresses surprise that it is not mentioned in appellants' brief. But a brief seemed to be no place for the obvious. This court, when having under advisement at the same time that case and *Hill* v. *Wallace*, distinguished the two statutes by annulling the one, while sus-

taining the other. The distinction will be equally obvious between the Packers Act and the Grain Futures Act, which is practically the Future Trading Act with a false reason for its enactment added.

The Packers Act did not seek to regulate trading upon, or membership in, a commercial exchange. There is no future trading in live stock either upon an exchange or elsewhere and could not commercially be any. There is no segregated trading of a purely intrastate character. The stockyards involved in the *Stafford case*, were a *public* market, to which all could resort to trade; the corporation maintaining it was a public-service corporation having the right of eminent domain, while "the Board of Trade is a *private* corporation (*Stock Exchange v. Board of Trade*, 127 Ill., 161, 166; *Board of Trade v. Nelson*, 162 Ill., 438), whose charter imposes upon it *no duty to the public*. Counsel seek to extract a contrary view from some of the language used in *Stock Exchange v. Board of Trade, supra;* but that case only decided that the quotations had been distributed for so long a time and had become so useful to the public as to be impressed with a public use to the extent that all are entitled to them, if any get them, but that the Board may at any time cease distributing them. The Packers Act applies to a business, in which the live stock comes on the hoof to the stockyards and its packing plants and goes thence as cut meats to consumers in other States. Five big packers do the slaughtering and dominate the whole business. Their abuse of their influence and control was obvious from decisions and other proceedings. Indeed, it was largely self-confessed, for the packers did not contest the statute, but some brokers and dealers, participating in a minor way in the sale of live

stock, did attack it—not by attempting to justify the conduct of these big packers, but by claiming that their transactions were so much apart from the main business that they were improperly included in the Act; but in this they failed.

There is thus no similarity between that Act or case and this case and the Grain Futures Act. The Packers Act was justified by the existence of real, serious, and direct encroachment upon interstate commerce. The Grain Futures Act is based upon a mere pretense of a burden, which, if it were a reality, would only incidentally affect that commerce. The Packers Act deals directly with a condition of an interstate character: the Grain Futures Act attempts to regulate what is wholly intrastate.

Replying now to the brief of the Department of Agriculture—this starts with the suggestion that the judgment of Congress on this economic question should be enough for this court, but that if it is not, then this court should certainly be guided by the superior wisdom of the Department of Agriculture and disregard the views of those "theorists"—poor, misguided souls—who at the expense, and with the approval, of our great universities are wasting their lives in the study of the principles of marketing in the vain hope that they may add to the sum of useful human knowledge by bringing about a better understanding of commerce and its laws.

This Department's brief is helpful in this respect: Appellants' main brief called attention to the fact that Prof. Seligman was right in saying that "the overwhelming weight of the evidence" produced in the hearings before the committees of Congress showed "that neither such future trading or such fluctuations in the prices of grain as do

occur therein are an obstruction to or burden upon interstate commerce in grain."

This plainly called upon the Government to show what there was in those hearings to make the judgment of Congress or of the Department of Agriculture controlling here.

The Department's brief attempts to do this. It presumably epitomizes for this court all in those hearings that is favorable to the Government's contention here. In doing so, some of its quotations contain only parts of what witness said, and the omitted parts should be read.

This brief also presumably presents all else (aside from those committee hearings)—including the economic views of the writer of the brief—which are thought to sustain the Department's position. As not a single professor of political economy is quoted as supporting the Government's contentions it may fairly be assumed that there is none such.

It is, therefore, confidently believed that, when this brief is read and compared with the conclusions of the Industrial Commission and the views of political economists quoted in appellants' appendix, and a little common sense is applied to the consideration of the circumstances surrounding, and the motive of those participating in, this future trading—this court will conclude that the claim that it constitutes a burden upon interstate commerce has no foundation in fact.

Secretary Hoover is quoted as saying that he has "the feeling," and that his "impression" is, that there have been "drives against prices," but concludes by saying that these make the fall of prices more precipitate and serve "to *accelerate what will be inevitable*," and that this "acceleration often works to the disadvantage of the producer." In other words, future trading (unless regulated by Congress) is a

burden upon interstate commerce, because it causes prices to reach the level warranted by the world conditions *sooner* than they otherwise would. But, as he seems not to consider, such trading often leads to an *increase* in price *sooner* than it would otherwise come, and this is a distinct benefit to the producer. This effect of future trading—which Secretary Hoover seems to deem hurtful—is regarded by all political economists (see appellants' appendix) as *beneficial*, because making fluctuations in prices *less violent and sudden and bringing sooner to all interested a correct knowledge of actual future values.*

But the price charts—which Secretary Hoover had not seen—should remove his impressions, as they removed any views of this kind the Industrial Commission may have at first entertained. (See appellants' appendix.)

To those familiar with the grain trade it will be clear that, if speculators wish to make "drives against prices" they will do so in the fall, when the heavy selling by farmers will help them to depress; but these charts in the record show no such drives, but instead a course of "orderly" marketing, in which the differences between the fall and spring prices are relatively such only, as should normally exist.

Indeed, the Industrial Commission found the fall prices more favorable to the producers "than they were before the advent of modern speculation." (See appendix thereto, p. 10.) And Prof. Wells shows (appellants' appendix, p. 39) that over a period of ten years farmers fared better by selling in the fall than they would have done by carrying through to spring.

These "impressions" about "drives against prices" are further disproved by the fact that, although future trading has

been constantly under investigation and criticism by those hostile to the exchanges, they have never been able to show that *any* person at *any* time has made such a drive, or has sold "short" with any other motive than to profit because the prevailing price seemed to him too high. (See further appellants' main brief, pp. 27-28.)

The failure of the Government's brief to appreciate the relation of the Board of Trade to the warehousing capacity in Chicago will explain why this Exchange seeks to escape the bureaucratic control, which this act contemplates. That brief says that in May, 1922, there was a sudden drop of 31 cents in wheat, because the Board of Trade put in force its emergency rule (Rec., pp. 26, 27), whereby 4,700 cars of inspected grain on track in Chicago were made conditionally deliverable. This step was taken only because the regular elevators were then all full. It enabled the owners of these carloads to sell their grain. It relieved a congested situation. It brought the price to the normal.

But the Department's brief complains because the Board of Trade does not provide more regular elevators; and this shows its misconception of conditions. The Board of Trade does not provide warehouses. Private enterprise now does that and State laws regulate them.

It is essential that every warehouse receipt deliverable in this future trading should be equally good. If one gets a receipt issued by a warehouse, from which the receipt holder must carry the grain by teams to boat or cars, it is not as valuable as one permitting delivery automatically from elevator to cars or boats. Every receipt must be from a warehouse upon the water, so that the shipper may get the lower lake-and-rail rate. Hence the Board makes "regular" only

such warehouses as are "conveniently approachable by vessel of ordinary draft and have customary shipping facilities." (Rec., p. 25.)

All such the Board of Trade welcomes; and the more the better. Indeed this exchange tried unsuccessfully to have the Illinois courts require railroads entering Chicago to provide adequate grain storage at all times, as they do depots for package freight (People *v.* Illinois Central, 233 Ill., 378). The Department of Agriculture might be more successful with Congress or the Interstate Commerce Commission.

It will thus be seen why the suggestion of that brief, that nonaccessible elevators should be included in this delivery system, may well alarm those charged with the responsibility of maintaining this great grain market.

It will be here understood that the delivery of carload lots in the "cash" business is in no way restricted.

The situation here complained of was—probably at the instance of the Department of Agriculture—made the subject of an investigation by the Federal Trade Commission under the resolution on page 18 of the Department's brief. But it made no condemning report, and could not without stultifying itself.

The Department's brief—disregarding the uncertain and varying conditions in Europe and the necessarily resultant wide fluctuations in grain prices in this country—lays hold of such fluctuations and particularly of a certain period thereof. But if this court will refer to the minority report of the House Committee on Agriculture on the bill for this Grain Futures Act, it will be seen that such fluctuations re-

sulted from inaccurate reports of the Department of Agriculture respecting crop prospects.

That brief also complains that the Chicago market at times attracts more grain than it should. This must be because it is the most favorable market for farmers to sell in; and this complaint seems inconsistent with the other complaint that the prices are unduly depressed.

The Department's brief also suggests the novel thought that, because large trust funds—by which it means funds for speculation—are drawn to Chicago, Federal supervision under the commerce power is justified. That suggestion needs no comment. Nor does the one which seeks to justify this act because prices in Chicago create a "world wide psychological effect."

That brief also deals to a certain extent with alleged facts not in the record or within the presumed knowledge of this court. We also ignore these.

That provision of the act (section 9) which punishes the circulation of false crop reports, etc., is not attacked in this suit. This Exchange disseminates no such reports. What it objects to is Sec. 5 (*c*), which imposes upon an Exchange the burden of preventing such false reports as a condition of its being permitted to function.

Respectfully submitted,

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